

K R A S K I N, L E S S E & C O S S O N, L L C
ATTORNEYS AT LAW
TELECOMMUNICATIONS MANAGEMENT CONSULTANTS

2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Telephone (202) 296-8890
Telecopier (202) 296-8893

September 11, 2003

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Annual Assessment of the Status of
Competition in the Video Market for the Delivery of
Video Programming; MB Docket No. 03-172

Dear Ms. Dortch:

A number of small video operators serving rural areas (hereafter the "coalition") are extremely pleased that the Commission's annual assessment of the video market has been expanded to consider not only statistical information about the delivery of video programming, but also the existing statutory and regulatory constraints that impede competition in the video marketplace.

Earlier this year, the coalition filed comments in support of the American Cable Association ("ACA") Petition for Inquiry into Retransmission Consent Practices," endorsing ACA's call for an inquiry into anti-competitive retransmission consent practices of broadcasters controlled by media conglomerates. While the activities of certain broadcasters conflicted with the "good faith" negotiation obligations established by Congress and the FCC, existing rules also contributed to the ability of larger media entities to extract unfair, and in many cases, unconscionable, concessions for carriage of broadcast signals. Inasmuch as these practices unfairly threaten the viability of small video provider competitors in rural areas, they are at odds with a competitive video marketplace.

Attached hereto and incorporated herein is a copy of the coalition's comments on the ACA petition. The coalition applauds this initial examination by the Commission of rules and laws that impede competition, and urges the Commission to take further steps to remedy the anticompetitive practices outlined by the coalition in its previous comments.

Respectfully submitted,



Sylvia Lesse
Marci E. Greenstein
On Behalf of the Coalition

STAMP AND RETURN

KRASKIN, LESSE & COSSON, LLC
ATTORNEYS AT LAW
TELECOMMUNICATIONS MANAGEMENT CONSULTANTS

2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Telephone (202) 296-8890
Telecopier (202) 296-8893

March 20, 2003

RECEIVED

MAR 20 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

W. Kenneth Ferree,
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Petition of American Cable Association
for Inquiry Into Retransmission Consent Practices

Dear Mr. Ferree:

A number of small video operators serving rural areas (hereafter the "coalition"), join to express support for the "Petition for Inquiry Into Retransmission Consent Practices" filed by the American Cable Association ("ACA") on October 1, 2002. The coalition, many of whom are ACA members, join together here for the purpose of underscoring for the Commission the importance of the issues raised by ACA and the dramatic effect these issues are having on their businesses. The coalition urges the Commission to solicit comment on the public interest implications of broadcasters' retransmission consent practices.

The coalition is concerned that broadcasters' practices are undermining the purpose of the retransmission consent rules. Commission action on the petition is necessary to bring to light and to correct a pattern of practices that violate the Communications Act and the FCC's mandate that broadcasters engage in "good faith" negotiations with MVPDs for retransmission consent. As ACA's petition demonstrates, and as coalition members can attest, broadcasters consistently fail to negotiate in good faith. Such failure threatens the viability of small video providers, particularly those serving rural areas.

In the course of their negotiations with broadcast stations for retransmission consent, coalition members have experienced the same anticompetitive practices as those documented by ACA in its Petition. Those practices have resulted in higher subscriber fees, fewer programming choices, and, in some cases, the loss of local programming.

Coalition members have encountered unilateral demands for carriage of affiliated stations or affiliated programming by stations owned by large media conglomerates, such as Disney, Fox, and others under so-called "tying arrangements." Broadcasters also extort exorbitant fees for carriage of

local and non-local broadcast stations.

Tying arrangements, presented to small rural video operators in a "take-it-or-leave-it" manner, and the lack of market power on the part of small video operators in the negotiation process belie "good faith" negotiation as envisioned by Congress and the Commission. More importantly, the result is contrary to the purpose of the Commission's rules and the public interest.

The demand for carriage of additional programming, irrespective of whether that programming is of interest to subscribers in a particular market, is especially damaging to small video operators, whose small systems have limited channel capacity. Carriage of such additional programming often requires that they drop programming preferred by their subscribers.

Broadcasters have also threatened to assert network-non-duplication or syndicated exclusivity rights in video providers' geographic areas as retaliation for the failure to agree to the broadcast station owner's terms for retransmission consent. Such threats have prevented carriage of customer preferred programming, including carriage of broadcast station affiliates in the video provider's community of interest. Broadcasters should not be allowed to utilize non-duplication and syndication rules, which were intended to foster local programming availability, to the perverse effect of impeding localism.

The retransmission consent practices described herein and by the ACA petition clearly violate Section 325(b)(3)(C) of the Communications Act, which mandates that broadcasters engage in "good faith" negotiation of retransmission consent rights with MVPDs.¹ The FCC narrowly interpreted the statutory "good faith" proscription based, in part, on the assumption that the bargaining power of MVPDs and broadcasters was relatively equal. However, that assumption does not hold true for small rural video providers in today's video marketplace, particularly where local broadcasters are owned by media conglomerates. The retransmission consent practices and their consequences articulated by the coalition and by ACA support that conclusion.

Nonetheless, the Commission did enunciate a list of specific practices that constitute a per se violation of the good faith negotiation requirement. In addition, the Commission established a "totality of circumstances" test to determine whether the parties had negotiated in good faith.² Under that test,

the totality of circumstances reflect absence of a sincere desire *to reach an agreement that is acceptable to both parties* and thus constitute a failure to negotiate in good faith.³

¹ This provision was enacted as part of the Satellite Home Viewer Improvement Act of 1999, PL 106-113, 113 Stat. 1501, Appendix I (1999). See also 47 C.F.R. Sec. 76.65.

² *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Doc. No. 99-363, 19 CR 1151, 1160-61, (2000). The Commission acknowledged that the size and relative power of broadcasters and MVPDs affected the dynamics of retransmission consent. *Id.* at 1168.

³ *Id.* at 1161 (emphasis supplied).

Coalition and ACA members describe situations in which small video providers are forced to accept retransmission consent agreements that ignore their subscribers' program preferences and that could lead to their own demise. Such agreements are not "acceptable" to small video providers. Rather, they are forced upon them. These circumstances clearly demonstrate a lack of good faith negotiation as directed by Congress and as interpreted by the Commission.

Under current FCC rules, the remedy available to video providers harmed by broadcast stations that fail to negotiate in good faith is to file a complaint with the Commission.⁴ However, the complaint process is inadequate to address abusive practices for several reasons.

First, a video operator is limited by time constraints. Under Section 76.64(f) of the Commission's rules, which governs local broadcast stations' "election" of retransmission consent or must carry, there is a scant three months between the election period (October 1st) and the beginning of the new three-year contract period (January 1st). Moreover, video providers must finalize contracts at least one month prior to their commencement date if programming changes result, in order to notify subscribers and regulators of such changes 30 days in advance, as required by the FCC.

Notwithstanding the Commission's non-specific admonition that retransmission consent complaints be handled expeditiously, the Section 76.7 complaint process does not provide an adequate remedy. This is largely due to the fact that while the complaint is pending, the video provider may not carry the station at issue. This stands as a significant disincentive to pursue a complaint against a broadcaster on the basis of failure to negotiate in good faith.

Additionally, prosecuting a complaint against a large media entity is a costly endeavor, and small operators have few resources compared to a broadcaster affiliated with a national media company. In many instances, very small, rural cable operators operate at small margins or at a break-even point.

Finally, MVPDs fear reprisal for filing a complaint. Small video operators are even reticent to identify themselves in connection with the anecdotal evidence discussed herein.⁵ This climate of fear is further evidence that the guidelines for good faith negotiation are not being enforced, and perhaps, are simply not workable and must be revamped.

In sum, the complaint process is not a practical means of addressing the pattern of abuses experienced by small video providers in negotiations with broadcasters affiliated with large corporate entities.

⁴ 47 C.F.R. § 76.7.

⁵ This should come as no surprise to the Commission, given Commissioner Copps' recent request for a special procedure to combat retribution against those who testify against media concentration, including allowing witnesses to testify anonymously. "FCC Commissioner Michael J. Copps Announces Two New Media Concentration Hearings; Calls for Protection for Fearful Witnesses," News Release, issued Feb. 5, 2003.

The need for an FCC Inquiry is compelling. Small video operators, particularly those serving rural areas, have little or no leverage in the retransmission consent negotiation process. They are therefore forced to accept the onerous terms demanded by the broadcast stations in order to transmit broadcast stations that their subscribers expect as part of their cable channel line-up, most especially local television station signals. Moreover, in many instances, the strong-arm tactics used by broadcast stations against small video providers are not isolated instances; rather, they are clearly orchestrated by the stations' national affiliates.

For these reasons, the coalition strongly urges the Commission to commence an Inquiry to examine retransmission consent practices at the earliest possible time, and to take whatever action is necessary to prevent further large-scale abuses of the retransmission consent negotiation process.

The coalition also asks the Commission to consider the practices utilized by, or at the behest of, large media entities, outlined above, in its ongoing analysis of media ownership rules. Clearly, the practices described by small video operators suggest that large media entities exert market power to the detriment of the public interest. Small video providers' experiences also suggest that lifting ownership restrictions will embolden broadcast station owners affiliated with large media companies to continue their improper retransmission consent practices that are harmful to small rural video providers and to the public.

Respectfully submitted,

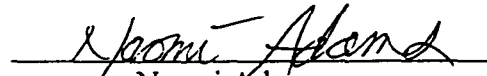
A handwritten signature in cursive script, appearing to read "Sylvia Lesse".

Sylvia Lesse
Marci E. Greenstein

On behalf of the Coalition

CERTIFICATE OF SERVICE

I, Naomi Adams, of Kraskin, Lesse & Cosson, LLC, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing letter on behalf of the Rural Video Coalition in support of the Petition for Inquiry of the American Cable Association, was served on this 20th day of March, 2003 by first class, U.S. mail, postage prepaid or by hand delivery to the following parties:


Naomi Adams

Susan M. Eid *
Office of Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Kenneth Ferree, Chief *
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Alexis John *
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Royce Sherlock, Division Chief *
Industry Analysis Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Stacy Robinson *
Office of Commissioner Kathleen Abernathy
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

John Norton, Deputy Division Chief *
Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Catherine Crutcher Bohigian *
Office of Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Eloise Gore, Assistant Division Chief *
Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Sarah Whitesell *
Office of Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Paul Gallant *
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Matthew M. Polka, President
American cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220

Christopher C. Cinnamon
Emily A. Denney
Nicole E. Paolini
Cinnamon Mueller
307 North Michigan Ave.
Suite 1020
Chicago, Illinois 60601

* via hand delivery